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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 781

CLINTON T. JOHNSON and EVA G. JOHNSON,
Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

Appeal from the District Court of Appeal, Second Appellate District, Division Four, of the State of California

BRIEF IN OPPOSITION TO MOTION TO DISMISS AND/OR AFFIRM

LESLIE W. IRVING,
SCOTT D. KELLOGG,
Tribune Tower, 20th Floor,
Oakland 12, California,
Counsel for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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BRIEF IN OPPOSITION TO MOTION TO DISMISS AND OR AFFIRM

I.

PRELIMINARY STATEMENT

This is a Brief in opposition to the State's Motion to Dismiss and/or Affirm.

This case presents important Constitutional questions involving the right to just compensation, the

right to a jury trial, the right to a fair trial, and the right to have a judgment protected against arbitrary reversal.

The appellate court's opinion is contrary to many decisions of this Court among which are the following:

1. *Griggs v. County of Allegheny*, 369 U.S. 84, the right to just compensation.

2. *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, the right to trial by jury.

3. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, due process.

4. *McCullough v. Virginia*, 172 U.S. 102, the right to have a judgment protected against arbitrary reversal.

Emphasis in *italics* will be ours unless otherwise stated.

II.

THE JUDGMENT IS FINAL

The appellate court invaded the province of the jury; reversed the jury's award which determined the market value of the property as of April 3, 1958; denied compensation for the public use of the property since May 9, 1951; and remanded the case "for a new trial on the issue of the damages to be awarded to the defendants." (App. xvi.)[1]

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[1]Whenever reference is made herein to "App.", we refer to the Appendix to the Jurisdictional Statement.

The judgment is final and this litigation can be fairly and simply ended now by reversing the appellate court and by affirming the jury's award for the market value of the property and directing the addition of interest for the public use of the property.

Immediate appeal will result in the speedy termination of this litigation.

A.

A JUDGMENT WHICH DENIES THE RIGHT TO TRIAL BY JURY IS A FINAL JUDGMENT

California Constitution Article I, Section 14, provides that the just compensation in eminent domain cases "shall be ascertained by a jury." (1 Cal. Const. A 165.)

Preservation of the right of a litigant to a trial by jury, which is guaranteed by both the federal and state Constitutions, should be maintained without exception, and this court has consistently reversed appellate courts which attempt to invade the province of a jury. In this case the appellate court invaded the province of the jury. The appellate court said (App. iv):

> ". . . Badgley declined to give any estimation of fair market value because as he stated: 'Your Honor, I am not a real estate appraiser, and that is not my concern.' He was only concerned with the 'reasonable economic value' in answering a client's question of 'what can I afford to pay for this; what can I expect to pay for it and still make economic ends meet.'"

Then contrary to the foregoing recital of the facts, the appellate court speculated (App. vii):

> "Even though the jury was instructed on market value we cannot overlook the possibility that the jury was misled and confused by Badgley's testimony. The jury might well have believed that his statement of valuation was not speculative but rather was an opinion of market value entitled to great weight in their determination of fair market value."

The facts show that the jury gave no weight to Badgley's figure in their determination of fair market value. The jury's award of $130,953 was almost $600,000 less than Badgley's economic feasibility figure of $728,000.

Similar speculation appears in the appellate court's opinion with reference to the alleged comparables. In that connection, the court said (App. ix):

> "We are of the opinion that because of the great lack of similarity and the difficulties involved any evidence of the sales of such alleged 'comparables' would have little, if any, value and would be more apt to mislead than to assist the jury in its determination of fair market value."

But the weight to be given such evidence was for the jury to determine. The facts show the jury gave it little weight.

The appellate court may not reweigh the evidence and usurp the jury's functions. In *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374, this Court said:

> ". . . a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."

The appellate court referred to "appraisers . . . (who) have 'stretched' their opinions as to value." (App. xi.) The weight to be given the opinion of an expert was a matter for the jury alone to determine. The trial court so instructed the jury. (CT 222, 240, 261.) In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-359, this Court said:

> ". . . But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. . . ."

In *Ellis v. Union P.R. Co.*, 329 U.S. 649, 653, this Court said:

> ". . . And where, as here, the case turns on controverted facts and the *credibility of witnesses, the case is peculiarly one for the jury.* . . ."

In *Continental Ore Company v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, this Court said:

> "The Court of Appeals was, of course, bound to view the evidence in the light *most favorable* to Continental and to give it the *benefit* of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. . . ."

But in the instant case the appellate court not only denied the benefit of the inferences which the evidence supports but indulged in contrary inferences which the record refutes.

In *Continental* (370 U.S. at 700-701) this Court said:

> "... There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.' *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 35."

A judgment which denies the right to trial by jury is a final judgment.[2]

B.

A JUDGMENT WHICH DENIES JUST COMPENSATION IS A FINAL JUDGMENT

The judgment in this case denied just compensation for the public use of the Johnsons' property since May 9, 1951. A similar judgment of the Supreme Court of Pennsylvania was held to be a final judgment by this Court in *Griggs v. County of Allegheny*, 369 U.S. 84.

The appellate court said that the "cases of *Ackerman v. Port of Seattle*, 55 Wash. 2d 400 (348 P.2d 664), and *Griggs v. County of Allegheny* (1962) ..... U.S. ....., 7 L.Ed.2d 585, relied upon by defendants are not analogous to the instant case." (App. xvi.)

The following analysis shows they are analogous.

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[2] *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500; *Dairy Queen, Inc. v. Wood*, 369 U.S. 469; *Simler v. Conner*, ... U.S. ....., ... L.Ed.2d ....., 31 L.W. 4223; *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29.

All three are eminent domain cases.

In the *Ackerman* and *Griggs* cases, the property owners brought their actions in inverse condemnation. In the instant case the State brought the action.

In *Ackerman* and *Griggs*, the public agencies did not believe they needed the property. In the instant case, the need for the property was determined by 2 resolutions of the public agency.

In the *Ackerman* and *Griggs* cases, the property owners filed their actions. In the instant case, the public agency filed two actions to acquire the property.

In all three cases: (a) the property owners retained legal title; (b) the property was adjacent to publicly owned property; (c) the property owners sought compensation for the public use of their property; (d) the public could have been excluded; (e) the public used the property, and the public use was the same use to which the public agencies would put the property when, as, and if, it obtained title; (f) the bases for the property owners' claim for compensation were the State Constitution and the Fourteenth Amendment to the Constitution of the United States; (g) the defenses asserted by the condemners were: (1) No use of the property was made by the public agency; (2) The use was made by the (flying) or (bathing) public and not the public agency; (3) The public agency exercised no control over the property; (4) There was no "taking" by the public agency; (h) no order of possession was secured by the public agency; and (i) no action was taken to exclude the "trespassing" public.

It is self-evident that the principles established in the *Griggs* case are applicable to the instant case. The judgment in the instant case, which denied just compensation, is a final judgment.

C.

THE CASE CITED BY THE STATE IS NOT IN POINT

The only case cited by the State in support of its Motion to Dismiss and/or Affirm was *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62. That case was not an eminent domain case but in the opinion reference was made to the principle that "a decision that a taking by eminent domain is for a public use, where the amount of compensation has not been determined, is not deemed final." (Page 68.) In support of that principle, the following cases are cited: *Grays Harbor Logging Co. v. Coats-Fordney Co.,* 243 U.S. 251; *Luxton v. North River Bridge Co.,* 147 U.S. 337; *Catlin v. United States,* 324 U.S. 229.

In the three cited cases, no jury trial was had to determine the amount of compensation and in each of the cited cases, this Court determined that a trial should be had on the issue of compensation before a hearing could be had in this Court.

In the instant case, there was a jury trial on the issue of the market value of the property and the jury determined the amount of such value. The judgment in the instant case is a final judgment.

III.

THIS LITIGATION SHOULD BE TERMINATED NOW BY THIS COURT

The decision of the appellate court should be reversed, the jury's award which determined the market value of the property as of April 3, 1958, should be affirmed, and this Court should direct that interest at the legal rate from May 9, 1951, to the date of the judgment be added.

Interest is an appropriate measure of the value of the public use.

The propriety of adding interest for public use prior to judgment was considered and approved by the California Supreme Court in the case of *Metropolitan Water Dist. v. Adams,* 16 C.2d 676, 680-683. The opinion in that case was based upon the following decisions of this Court: *Seaboard Air Line R. Co. v. United States,* 261 U.S. 299, at page 306; and *Jacobs v. United States,* 290 U.S. 13, at pages 16 and 17.

IV.

A RE-TRIAL WITHOUT THIS COURT'S PRIOR REVIEW WOULD RESULT IN AN UNFAIR TRIAL

This Court's review is fundamental to further proceedings. Without review by this Court, the owners will return to the trial court with their rights adversely predetermined; with appellate court findings which deny the owner the opportunity to introduce proof; with their value witnesses discredited by an

appellate court which neither saw nor heard them; with appellate court approval of a presumption that the award includes an amount for inconveniences, although the owners offer to prove the value of such inconveniences was denied; and with an approved "entrapment" procedure where proof is required in the trial court and where such proof is called "prejudicial" in the appellate court.

This Court has steadfastly enforced the Constitution's requirements that litigants be given a fair trial. The essential thing is the opportunity to be heard and the appellate court's opinion denies that opportunity. Its opinion compels an unfair retrial, in that:

(a) The appellate court made a finding of "no taking" without affording the owners an opportunity to present their evidence. (The trial court denied the owners' offer of proof.) (App. xv-xvi.)

(b) The appellate court found that the owners had "the power to exclude the trespassing public". (No such issue was raised and the owners were given no opportunity to be heard.) (App. xvi.)

(c) The appellate court indulged the presumption that the award included an allowance for the public use of the owners' property. (But the owners were denied the opportunity to offer proof of the value of the use.) (App. xv.)

(d) The appellate court discredited the owners' witnesses. The opinion refers to "appraisers . . . (who have 'stretched' their opinions as to value". (If this were to be an issue for appellate court determination,

the owners and their witnesses should have had an opportunity to be heard.) (App. xi.)

(e) The appellate court labelled as "prejudicial" evidence which the state's instruction 22 invited. (This procedure has elements of "entrapment" and gives the state an advantage which it denies the owners.) (App. iii-vii.)

(f) The appellate court held that certain comments of the trial court were improper. (But the State made no objection to them in the trial court and "trial court objection" is essential to appellate court consideration.) (App. x-xiii.)

From the foregoing, it is obvious that this Court's review of the instant case is essential to a fair retrial.

V.

SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED

The preceding pages refer to the important Constitutional questions involved and the substantial federal questions presented.

The appellate court's opinion condones more than eleven years uncompensated public use of private property and approves proceedings which permit the continuance of that public use without payment of any compensation. If the state can thus make full public use of the property of the citizen and avoid the obligation to pay just compensation therefor, the Constitutional guaranty will be without substance.

VI.

CONCLUSION

If the appellate court is not reversed, this case can and will be cited as a repudiation of the decisions of this Court construing the Constitutional right to trial by jury, the right to due process, the right to a fair trial, and the right to just compensation.

Appellants respectfully submit that the Motion To Dismiss and/or Affirm should be denied and the case heard on briefs and oral argument.

Dated, Oakland, California,
March 15, 1963.

Respectfully submitted,
LESLIE W. IRVING,
SCOTT D. KELLOGG,
Counsel for Appellants.